NO. 90-5 55

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL R. WOOD,

Petitioner,

v.

ALAMEDA COUNTY SUPERIOR COURT,
CITY OF HAYWARD, CALIFORNIA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.In an eviction action were the service of the summons is served sole by posting a violation of due process for failure to give actual notice?

2.In an eviction action does the trial court have jurisdiction over the defendant for lack of the service of the summons that was served solely by posting posting, and failed to give actual notice?

3.In an eviction action where the tenant's whereabouts are reasonably ascertainable is service of posting alone constitutionally sufficient not to be denial of due process for failure to give actual notice?

4. In an eviction action where the tenant is a absentee tenant does the statute require that their be two notice to give actual notice, and if does not is it unconstitutional as applied to absentee tenant's?

PARTIES

The parties in the court below are as set forth in the caption. The City of Hayward, California is the Real Party Interest, and the respondent in the lower court was the Superior Court of Alameda County, California, and Judge Richard A. Hodge was presiding. The trial court was the Municipal Court of Alameda County, San Leandro-Hayward Judicial District, California, and Judge Leo Dorado was presiding.

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The petitioner Michael R. Wood respectfully prays that a writ of certiorari issue to review the judgment, of the Court of Appeal of the State of California, First Appellate District, Division Four entered in this proceeding on April 13, 1990. Faced with the probability of forced eviction from his aircraft storage hanger for failure to receive actual notice, and that to receive said summons and its manner of supposed service, posting only, violated due process. Due to the public nature of his aircraft storage hanger at a public airport, absentee tenant assert that his right to remain in said aircraft storage hanger is a property interest which is protected by the United States

Constitution. Thorpe v. Housing Authority of City of Durham, (1969) 393 U.S. 268; Petitioners' interest is one of great importance, an importance which is relegated to the scrap heap of inconsequence by the unreliable process of notification commonly known as "posting".

OPINION BELOW

The judgment, and orders, of the lower courts are not reported, and appears in the Appendix hereto. The lower courts affirmed a judgment that "posting" a summons in an eviction action that was served solely by "posting" a summons in an eviction action that was served solely by "posting only", and was not a violation of due process. Further, the lower court affirmed that where a absentee tenant's whereabouts are reasonably ascertainable that the service of the summons by "posting only" is constitutionally sufficient, and that the trial court has jurisdiction over the tenant by service of the summons solely by "posting only".

The Supreme Court of the California, Petition for Review, case no. S015217, and is set forth in the Appendix, A-1.

The Court of Appeal of the State of California, First Appellate District, Division Four, Writ of Mandate, case no. A049090, and is set forth in the Appendix, A-2.

The Superior Court of California of the State of California, County of Alameda, Writ of Mandate, case no. H-145900-3, and is set forth in the Appendix, A-3.

The Municipal Court of California, County of Alameda, San Leandro-Hayward Judicial District, Motion to Quash Service of the Summons under Civil Procedure, Section 418.10(a), and is set forth in the Appendix, A-4.

BASIS OF THE COURT'S JURISDICTION

The judgment of the Court of Appeal of the State of California, First Appellate District, Division Four was entered on April 13, 1990. A timely petition for Writ of Review was filed with the California Supreme Court, which was denied on May 30, 1990, and rehearing was not sought. This petition for Certiorari was to be filed within 90 days of that day (August 28, 1990), but Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States extended to and including September 27, 1990 to file a petition for a Writ of Certiorari in the above-entitled case by extending said time to file. The court entered an order on August 24, 1990, based upon an application, No. A90-141. This court's jurisdiction is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

This action involves the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. XIV, Section 1 as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws."

CALIFORNIA STATUTE IN QUESTION

This action involves California Code of Civil Procedure, Section 415.45 as follows:

Section 415.45. Unlawful detainer; service by posting and or other Manner,

(a) A summons in an action for unlawful detainer of real property may be served by posting if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in any manner specified in this article other than publication and that:

(1) A cause of action exists against the party upon whom service is to be made or he is a necessary or proper party to the action; or

(2) The party to be served has or claim an interest in real property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding such party from any interest in such property.

(b) The court shall order the summons to be posted on the premises in a manner most likely to give notice to the party to be served and direct that a copy of summons and of the complaint be forthwith mailed by certified mail to such party at his last known addresses.

(c) Service of summons in this manner is deemed complete on the 10th day after posting and mailing.

(d) Notwithstanding an order for posting of the summons, a summons may be served in any other manner authorized by this article, except publication, in which event such service shall supersede any posted summons.

STATEMENT OF THE CASE

The case involves the use of constructive service of process for the service of the summons to notify absentee tenant of an aircraft hanger for storage of his airplane at Hayward Air Terminal a public airport that a unlawful detainer complaint had been filed against him in state court. The absentee tenant complains that he's been deprived of due process of law due to his failure to receive or have actual notice of the summons. The purpose of said summons is to notify him that his landlord, the City of Hayward, had initiated an action to evict him from his aircraft hanger for storage of his airplane. Currently their is over a ten year waiting list at Hayward Air Terminal, and over 20 years at San Carlos airport being the closest other airport. Due to shortage of aircraft hangers, and long waiting lists in San Francisco Bay area the tenant would be required to leave the San Francisco Bay area requiring the tenant to move over 200 MIles or more to find another aircraft storage hanger. The summons are served as in any civil actions by personal service at his tenants "dwelling house, usual Place of abode, or usual place of business" is most likely to receive actual notice. The practice of Hayward Air Terminal was to serve the absentee tenant at a pad locked aircraft storage hanger so the absentee tenant would not receive actual notice, and the servers

endeavors to make personal service was "woefully perfunctory" with no intent at all to make personal service of the absentee tenant who was absent from the aircraft storage hanger (note 1). The server made no "due diligence attempt to serve the absentee tenant at his "dwelling house, usual place of abode, or usual place of abode, or usual place of business" to make personal service, and made no reasonable efforts to locate him (e.g., process mailed and returned "no forwarding address", search of phone books, voter registrar records, voter registrar records, D.M.V. records, last known address or address where monthly bills are sent attached to the complaint - paragraph 11, etc.). The server then prepared a declaration under penalty of perjury that defendant cannot with reasonable diligence be served in any authorized manner, and that he attempted to serve the absentee tenant personally was "woefully perfunctory" with no intent to give actual notice. The court approved the service of the absentee tenant by "posting and certified mailing" ("nail and mail") method

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(Note 1) Based upon the Ex Parte Application Declaration of Diligent Search of the process server declared: I have made the following search and inquiry: The process server went to absentee tenant's aircraft storage hanger on five separate occasions --- once on October 6, 1989, and found said executive aircraft storage hanger No. 13 at 6:00 p.m. pad locked; and on four more times he found the executive aircraft hanger No. 13 pad locked.

His endeavor to make personal service was "woefully perfunctory"; he did not attempt to make personal service at the absentee tenants "dwelling house, usual place of abode, or usual place of business" or make inquires of the whereabouts of the absentee tenant.

of service applicable only in unlawful detainer actions (note 2). The practice was to "post only" the summons without a copy of the order allowing "posting and certified mailing" on the aircraft hanger door, and thereafter without certified mailing of the summons, and the order allowing posting and certified mailing. Further, if the mailing did take place it was not sent to "last known address", but to the aircraft storage hanger where their was no mail service, and the absentee tenant would not receive actual notice that a unlawful detainer action had been filed against them in the state court. The absentee tenant alleges this manner of notice was a violation of the actual notice requirement of the Due Process Clause.

The issue was first raised before the trial court who was the Municipal Court of Alameda County, San Leandro-Hayward Judicial District, California, and Judge Leo Dorado was presiding over the Motion to Quash Service of the Summons by the absentee tenant, which was denied (note 3). The defendant thereafter filed a writ of mandate under California Code of Civil

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(note 2) If court approval is obtained, section 415.45 service is effected by "posting" a copy of the summons on the tenant's premises in a manner most likely to give actual notice; and sending a copy by certified mail to the tenant's last known address [C.C.P. section 415.45(b)]. The tenant's "last known address" for all "notices" was given at the time entering and signing the lease with the landlord as required by paragraph 11 of the lease attached to said complaint.

(note 3) Motion to Quash Service of Summons filed by the absentee tenant (defendant) for lack of actual notice of the service of a summons based upon "posting only", and that he was unaware that a summons had been "posted" at his aircraft storage hanger. Tenant testified that he had not received any first class or certified mail containing a summons or any of any court documents. Thereafter, the landlord (plaintiff) produced "manufactured evidence" of a

Procedure, section 418.10(c), to require the trial court to enter its order quashing the service of summons based upon "lack of reasonable diligence" and "posting only" with the Superior Court of Alameda County, California, and Judge Richard A. Hodge was presiding over the writ mandate, which he denied. Further, the defendant moved again for review of the summarily denial of the writ of mandate, which was obtained by filing a petition for writ of mandate in the Court of Appeal of the State of California, First Appellate District, Division Four, which was then denied. Finally, the defendant timely filed in the Supreme Court of the State of California of the State of California a petition for Writ of Review, which was denied. The exact issues raised thought out all the court proceedings was the "lack of reasonable diligence" and "posting only" of the summons being a violation of the due Process Clause.

(note 3)

receipt for certified mail No. P 543 013 453 from the post office missing the post mark with the date on it, also called a bull's eye showing a date endorsed by postal employee at time of mailing. Lack of date shows that no mailing took place as to the certified mail with the post office. The plaintiff employees and agents manufactured evidence to showing that the summons had been mailed to "Michael R. Wood, Hayward Air Terminal, Executive Hanger #13, Hayward, California", and that mailing had been performed; and thereafter, actual notice had been given to the tenant of the pending action.

The plaintiff over look a small problem, and is their is no mail service to the aircraft storage hanger at the airport. Based upon the introduction of the manufactured evidence the absentee tenant (defendant) produced evidence and testimony of (7) seven different persons declarations including U.S. postal employees impeaching the testimony of the process server, and the manufactured evidence submitted to the court as evidence that certified mailing had taken place, and the tenant had received actual notice. A summary of the testimony (1) Michael R. Wood, testified that he had no knowledge of the posting of the summons,

SUMMARY OF THE ARGUMENT

Tenant faced with the probability of forced eviction from his aircraft storage hanger for failure to receive actual notice, and that to receive said summons by its manner of supposed service, "posting only", violated the tenant's constitutional Rights of Equal Protection and Due Process under the Fourteenth Amendment. Due to the public nature of his aircraft storage hanger at a public airport, tenant assert that his right to remain in said aircraft storage hanger is a property interest which is protected by the United States Constitution. Thorpe v. Housing Authority of City of Durham, (1969) supra.; *Petitioners interest is one of great importance,*

and that he had not been served; and that he had not received any first class mail or certified mail; (2) John H. Pendly, testified during the time period of the service of the summons the tenant had been available for service almost every day at the airport; (3) Bob B. Polehla, testified that he has an aircraft hanger in front of executive hanger No. 13, and that their is no mail service at the aircraft hanger. Further, no commercial business active takes place at said hanger; and that during the time period for service of summons that the tenant had been available for personal service; (4) & (5) Pauletta A. Arteaga, and Kathy Lehman clerks of the United States Post Office testified that their is no mail service to said aircraft storage hanger. Further, search of the post office records shows that "no" letter was sent by certified mail No. P 543 013 453 to tenant Michael R. Wood, and the above certified receipt does not show the "postmark or date" to be considered certified mail by United States Post office as required by D.M.M. section 912.44(e). Jeffrey D. Kuhn testified that he was a witness to a conversation with Michael S. Spurek, V.P. of Wakeman Process Service, Inc. who said "they never do certified mailing of the summons". The service of process (posting and mailing) was based upon "false testimony", "false return of service" and "fabricated documents" to obtain jurisdiction over the defendant, and thereafter planned to enter a default, and default judgment by denying the tenant his Constitutional Rights of Equal Protection and Due Process under the Fourteenth Amendment.

an importance which is relegated to the ***scrap heap*** *of inconsequence by the* ***unreliable process of notification*** commonly known as "posting" (note 4).

Tenant argue the following: First, the nature of tenant-landlord matters is no longer in rem. Due to the changing dimensions of these proceedings, due process requires a manner of service more reasonably calculated to apprise the tenant. Second, because these matters are in personam, the Fourteenth Amendment mandates that posting in tenant-landlord matters, when used alone as the form of notice, is unconstitutional. Under California Code of Civil Procedure, Section 415.45, no guarantee that additional notice to tenant of the upcoming litigation is forthcoming, though it could result in him being forcibly removed from his aircraft storage hanger, and a judgment against him for rent allegedly owed.

Due process consists of two important elements, notice of the proceedings and an opportunity to be heard at a meaningful time. Without ensuring that notice and its manner of service is reasonably calculated to apprise each individual of an upcoming proceeding the opportunity to be heard is meaningless. Posting of a summons has inevitable risks: it may be misdelivered or not even delivered at all, it may be pulled down by others, and it is at the mercy of the elements of earth, water, air, and fire. Any one of these events would result in the summons never reaching the tenant and never providing notice.

(note 4) Posting is a process by which the process server places a summons on the property by use of thumb tack, tape or other means.

This Court has reviewed the manner in which notice to litigants is given notice, although never precisely guaranteeing actual notice in the tenant-landlord area. Where notice has been unreliable and reasonablY calculated under all circumstances to apprise the litigant of the upcoming judicial proceeding, this Court has disallowed such notice. This is exactly the problem with the posting of the summons: it is simply not reasonablY calculated to apprise tenants of up coming litigation.

Tenant believes that posting can not be rendered constitutional if server never attempts to make personal service first at tenants "dwelling house, usual place of abode, or usual place of business" or "last known address" of the tenant. if, he makes all his attempts at a locked aircraft storage hanger then the attempt to make personal service of the tenant is nothing more than "woefully perfunctory" with no intent to give actual notice. Further, tenant believes that if posting may be rendered constitutional if a second posting took place other than at an aircraft storage hanger that is pad locked be performed at the tenants "dwelling house, usual place of abode, or usual place of business" or "last known address" of the tenant as an additional service requirement. Additional service should at least take the form of a copy of the summons, complaint, and order of the court allowing said service by certified mail, restricted delivery to the name tenant, and a return receipt requested to his "dwelling house, usual place of abode, or usual place of business" or "last known address" of the tenant, and not the aircraft storage hanger and/or the address of the landlord. Restricted delivery and return receipt requested of the tenant protects against the landlord, and/or process server from tampering with the service so appears that service has been performed, and would create the

likel;ihood that notice would be reasonably calculated to apprise the tenant of the upcoming proceeding.

The precise issue before this court is whether California Code of Civil Procedure, Section 415.45 violated petitioners' procedural due process rights. The test this Court has formulated when considering questions of procedural due process can be stated very succinctly; is the service of summons reasonably calculated under the circumstances to apprise the affected party notice of the pending action and an opportunity to be heard. This test does not now, nor ever has, required actual notice to the affected parties. The California statute allows for tampering, and preventing of actual notice to the tenant of the upcoming proceedings.

REASONS FOR GRANTING THE WRIT

The precise issue presented in the writ is substantial as to require plenary consideration, because of the need of an efficient and effective manner for adjudicating unlawful detainer actions without denying "actual notice" requirement of the Due Process Clause so the tenant will "receive actual" notice by personal service when whereabouts are reasonably ascertainable. The present California statute afforded tampering of the service by the City of Hayward and like proprietors effective menss of accomplishing a prompt adjudication of tenant -landlord disputes without "actual notice" to the tenant, and a denial of the Due Process Clause. The ability of a landlord to use the California posting and mailing statute, to "post only" when the tenant's whereabouts are reasonably ascertainable will allow an experienced process server to server the summons without giving the court jurisdiction, and actual notice to the

tenant, thus depriving the tenant of a fundamental to Equal Protection and Due Process of the Fourteenth Amendment that "No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The Supreme Court addressed in International Shoe Co. v. Washington (1945) 326 U.S. 310; Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306; and Shaffer v. Heiter (1977) 433 U.S. 186. These cases dealt with quasi in rem actions, that is the property or tangible items itself, but was seized as a means of satisfying a possible judgment against the defendant whom in personam jurisdiction could not be obtained. The shaffer Court formulated the now famous "minimum contacts" test for obtaining quasi in rem jurisdiction over a defendant. The test requires that such minimum contacts exists that in personam jurisdiction over the defendant could be exercised under International Shoe. The practical effect of Shaffer was to eliminate pure quasi in rem proceedings to acquire jurisdiction for a judgment when in personam jurisdiction could not be obtained. California has no in personam jurisdiction over the tenant in the present case.

In Mullane, supra., the Supreme Court address the constitutional sufficiency of publication notice rather mailed individual notice to known beneficiaries of a common trust fund as part of a judicial settlement.

The Court observed that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process. It further stated that notice must be "reasonably calculated, under all

the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it . The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." Mullane, supra.

The Court held that publication notice could not satisfy due process where the names and addresses of the beneficiaries were known.

Further, in Mullane, supra., the Supreme Court held that it must balance the individual interests sought to be protected by the Fourteenth Amendment, and that interest is defined by the holding that "The fundamental requisite of due process of law is the opportunity to be heard". (citing Grannis v. Ordean, 234 U.S. 385 394.) Further, the court said at 306 U.S. at p. 314:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

the language in Mullane court have made short shrift of the landlords argument that posting is const;itutional without giving additional notice by mailing. But if mailing did take place their still is no actual notice being guaranteed by the statute, which doesn't require

actual delivery of the summons to the person to be served, or a signed receipt or other evidence showing actual notice. The case before this court shows no due diligence or registered and/or certified mail with a signed return receipt showing that the tenant received actual notice by a summons that a complaint had been filed against him in state court.

The Mullane case thus specifically held notice by publication when the names and address are known does not comport with notice requirement of the Due process Clause. Such is the issue in the present writ, notice has never been effected by "posting" on an aircraft storage hanger door and the petitioner must empHasize that "posting" is used as a method to prevent service of the summons so that the tenant will not receive actual notice of a pending suit. The private process server who purportedly attempted personal service on the tenant of the summons didn't attempt to serve the tenant at his dwelling house, usual place of abode, or usual place of business" or "make inquires of the whereabouts of the tenant", But always went to a pad locked aircraft storage hanger. Petitioner believes the California statute fails to require a return receipt showing that the tenant received said mailing containing the summons and complaint giving actual notice that a complaint had been filed against him a state court. Further, that the posted notices would have been removed by aircraft engines starting up, or an aircraft passing the location were the summons had been posted causing it to blow off the aircraft hanger door. The fact of actual notice is relevant to the question before the Court because the test is relevant to the question before the Court, because the test under Due Process Clause as to the validity of notice is whether the defendant actually receives notice, or did the process server just

go thru the act of service. Attempted personal service was nothing more than"woefully perfunctory", but rather whether the method used is one reasonably calculated to give no notice so a judgment against the tenant may be entered.

A. The Nature of Tenant-Landlord Proceedings in California Mandates that Notice be used Which Is Reasonably Calculated to Apprise Tenant of Eviction Proceedings.

Code of Civil Procedure, Section 415.45 authorizes a "posting" method of service applicable only in unlawful detainer actions on a tenants door, and only under limited conditions: The court give prior approval to this method of service. Such approval is granted without showing that tenant cannot not be found with reasonable diligence, and that the servers exhaustive attempts at tenant's "dwelling house, usual place abode, or usual place of business" or "last known address". In California the process servers have boiler plate declarations that allow tampering without giving actual notice to the tenant by personal service, and allowing posting that may be misdelivered or not delivered at all, it may be pulled down by others, and it is at the mercy of the elements. Since the tenant has a life time tenancy, and the tenant-landlord proceeding is no longer solely in rem in California, any in persoam application of due process clearly apply to these proceedings. As will be expanded upon below, due process, as it applies to posting in tenant-landlord matters, requires better substituted service than the mere 'posting" of the summons upon a aircraft storage hanger door (20 feet high by 60 feet long). Green v. Lindsey (1982) 456 U.S. 444; and Mennonite Board of Missions v. Adams (1983) 462 U.S. 791.

B. Due Process Requires Notice that is Reasonably Calculated, Under all the Circumstances, to Apprise Tenant of Upcoming Proceedings.

Due process is a concept which embodies fundamental fairness. It cannot be precisely defined and defies any mechanical application of the Fourteenth Amendment. Lassiter v. Department of Social Services of Durham County, North Carolina (1980), ___ U.S. ___, 101 S.Ct. 2153. It is a concept which flexibly amendable to the needs of an ever-changing society. The flexibly amendable to the needs of an ever-changing society. the Fourteenth Amendment provides that in order to conform to due process one is entitled to notice so that one may be heard. Parratt v. Taylor (1981), ___ U.S. ___, 101 S.Ct. 1908; Boddie v. Connecticut (1971) 401 U.S. 371; Fuentes v. Shevin (1972) 407 U.S. 67 It is tenant's position that given the nature of due process, "posting alone" does not conform to this constitutional principal in eviction actions.

C. Due Process Places Substantive Restrictions on Posting as a method of Notice.

In light of the this Court's regard for notice and due process, "posting" will be evaluated.

Reasonableness of notice is determined by balancing the state's interest in final adjudication of rights to property within its jurisdiction against the individual's interest in notice of the proceedings. Mullane, supra at 313-314. Any lack of notice which would defeat the state's interest in a final adjudication is not justified. Id. at 313-314. When personal service is not possible, the minimally acceptable alternative is that which which is most reasonably calculated to advise the litigant of the proceedings.

Schrodeder v. City of New York (1962), 371 U.S. 208; City of New York v. New York, New Haven and Hartford Railroad Co. (1953), 344 U.S. 293; Mullane, supra.; Walker v. City of Hutchiknson (1956) 352 U.S. 112. Neither seizure of property nor publication now sufficient to inform persons of actions pending against them. No proceedings will lie against a person who can be readilY Located uNless that person is notified by mail or such othermeans as is certain to ensure "actual notice".

Finally, a statutory requirement that absentee tenants give notice of their mailing address to the landlord, and that a copy of the mailed notice be sent to that address was feasible and would have greatly increased the likelihood of actual notice to absentee tenants. Schrodeder v. City of New York, supra., at 212-13; Walker v. City of Hutchinson, supra., at 116. In light of the deficiencies described above, the 1978 statutes Code of Civil procedure, Section 415.45 failure to require this second mailing renders that law unconstitutional as applied to tenant, Wuchter v. Pizzutt (1928), 276 U.S. 13, 24, because without it they were deprived of constitutionally valid notice.

In reviewing the decisions of the court below we find the reasoning applied to this question of law to be correct. In the case of Sterling v. Environmental Control Bd. of N.Y.C. (1986, 2nd. Cir.) 793 F.2d 52 held that the state statute was unconstitutional as applied to absentee landlords, and that extra statutory Measures cannot render the statute unconstitutional on its face. The statute's failure to require this second mailing renders the statute unconstitutional as applied to these tenants of aircraft storage hangers, because the likelihood that the posted notices here will Not reach the intended recipient is less than in Greene, supra., . These tenants do not live on the premises.

D. Posting is not Reasonably Calculated, under all the Circumstances, to Alert Tenant of the Pendency of Eviction Action.

The present adequacy of notice by posting must be evaluated in light of the realities of contemporary society, rather than by conditions which existed at the turn of the century. This Court has long recognized the need to account for changing societal norms in its application of constitutional guarantees to different factual situations:

> "[W]hile the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operations. Village of Euclid v. Amoler Realty Co. (1926), 272 U.S. 365, 387."

Service by posting creates a substantial risk that the tenant will not receive notice of the action against him or her. Their are times when tenants do not receive the Summons. Posting cannot guarantee against the possibilities that the summons will be blown away by an aircraft, mis-delivered or not delivered, ripped down by third parities, or otherwise taken from the attention of the tenant who is being threaten with imminent eviction. These plausible mishaps indicates the lack of reasonable calculations of posting to be received under all the circumstances.

In fact, this most unreliable of methods, in practice, is most commonly used by landlords in California so that the tenant would not receive actual notice.

Notice is of utmost importance herein. Without ensuring that the first elements of due process, notice of the proceeding, is manda -tory, the second portion, opportunity to be heard, will evaporate and become meaningless. Outside of an individuals's family and liberty, there is no one more important element to an individual than his/her home. In this case the home is an aircraft storage hanger, which is the home of the aircraft where repairs are done on said aircraft. The aircraft hanger, be it rented or owned, Has been described as "not merely a building, storage shed or a garage for an aircraft, but the place where one eats, reads, studies, visits, throws off the cares of business and a place to meet other aviators". It is that domain to which the summons, and Unlawful Detainer Complaint is directed at.

E. Certified Mailing, and Restricted Delivery with a Return Receipt Requested, as an Additional Requirement Where Posting is Used, will give Actual Notice to the Tenant of the pending proceedings, and will prevent Abuse and Misuse of "Posting" by Landlords and Process Servers.

Application of the foregoing balancing test to the case at bar discloses no reasons why notice by certified mail, restricted delivery with return receipt requested showing to whom delivered was made (tenant), date, land addressee's address (place of service), and a post mark, or the date mailing within the bull's eye should be required. This type of mailing would prevent misuse of posting, and more personal service on the tenants. If posting is used the added requirements of the mailing

would prevent abuse by landlords and process servers, and the additional requirement of mailing a summons to the defendant would not place an undue fiscal or administrative burden on the landlord or the courts. The postage cost would be de minimums.

The landlord in this case will argue that the summons was mailed by certified mail the summons, and service was completed as to the defendant by the fact it had been mailed. Here the landlord cannot show a certified receipt with a post mark on it, or a bull eye's with date within it that a summons had been mailed to the tenant, and can not show that a return receipt from a certified letter was received by the tenant giving actual notice of the pending action that had been filed against the tenant in the state court.

Additionally, the mails have the protection of the federal statutes regarding their delivery and safety (See 18 U.S.C. section, 1702), but " . . . [P] utting a letter in the mailbox does not provide that the (Tenant) will get notice of its contents. Only receipt can do that." Matter of Levens, (5th Cir. 1977) 563 F.2d 1223. Further, as stated in Stamps v. Superior Court, 14 C.A.3d 108; 92 Cal. Rptr. 151 :

> " . . . by sending a copy of the summons and of the complaint to the person to be served by . . . mail . . . " Proof of service by that method "shall include evidence satisfactory to the court establishing actual delivery to the person to be served bearing the notice "unclaimed". Hence there was no 'signed receipt of or other evidence' of delivery."

"(1a) In the case now before this court the process was sent by . . . [mail], return receipt requested, but the return receipt was returned bearing the notice "unclaimed." Hence there bearing the n notice "unclaimed." Hence there was no "signed receipt or other evidence" of delivery."

"(2) In order to obtain in personam jurisdiction through any form of constructive service there must be strict compliance with requisite statutory procedures. (1b) That was not accomplished.

The landlord emphasis on speed of process rather than due process should be viewed with a questioning eye. Certainly the purpose of due process is not speed, but fundamental fairness. As stated in Stanley v. Illinois (1972) 405 U.S. 645:

"The Constitution recognizes higher values than speed and efficiency; the Bill of Rights in general, the Due Process Clause in particular, were designed to protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency . . . . at pi. 656.'

The concept of fundamental fairness embodied in the Fourteenth Amendment requires that the likelihood of receipt of the notice be increased as much as possible whever substituted service is employed. Further, when one considers the tragic loss and deterioration of due process that will result from a failure to ensure that notice is provided, there is little doubt that a mailing requirement is mandated by the fourteenth Amendment.

F. Posting notice alone to a tenant on a aircraft Hanger Door where tenants whereabouts are reasonably ascertainable does not satisfy the Due Process requirements of the Fourteenth Amendment to the United States Constitution.

The concept of notice and the opportunity to be heard was defined as a "fundamental requirement of due process in any proceedings which is to be accord finality . . . " Mullane vs. Central Hanover Bank and Trust Company, supra. at pg. 314. Numerous cases decided since Mullane have analyzed and refined this concept. In reliance on Mullane and its progeny, that posting alone does not suffice and, raises constitutional issues. Grenn v. Lindsey (1982), supra. Mennonite Board of Missions vs. Adams, (1983), supra.. In reliance on Mullance and have analyzed and refined this concept. In reliance on Mullance and its progeny, that posting alone does not suffice and, raises serious constitutional issues. Green v Lindsey (1982) supra.; Mennonite Board of Missions vs. Adams (1983) supra.; had determined that service by posting alone constitutionally insufficient where defendant's whereabouts reasonably ascertainable, and including most recently Tulso Profesional Services, Inc. v. Poper (1988) 485 U.S. 811.

the issue before the Court is whether the due process clause of the Fourteenth amendment to the United States Constitution extends its protection to the rights of tenants where the service by posting alone constitutionally insufficient where's tenant's whereabouts reasonably ascertainable by the landlord by means as is certain to ensure actual notice to the tenant.

CONCLUSION

As old as Pennoyer and twice as unconstitutional is an appropriate description of 'posting'. Because of the danagers involved with its use, dangers which thwart it usefulness as a manner of service reasonably calculated to provide notice, and because of the importance of the matters involved, the Fourteenth Amendment requires the use of posting, as provided by the Code of Civil Procedure, be stricken as unconstitutional.

The petitioner submits that the service of the summons has failed the test, and for the foregoing reasons a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
In Propria Persona

Supreme Court
Filed, May 30, 1990
Robert Wandruff Clerk

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

FIRST APPELLATE DISTRICT,
DIVISION FOUR, NO. A049090,
S015217
IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA IN BANK

MICHAEL .R. WOOD,
Petitioner

V.

ALAMEDA COUNTY SUPERIOR COURT,
Respondent

CITY OF HAYWARD,
Real Party In Interest

Petition for Review DENIED

/s/ LUCAS

Chief Justice

Filed
April 13, 1990
Court of Appeal,
First App. Dist.
Ron D. Barrow Clerk

COURT OF THE APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FOUR

WOOD, MICHAEL
VS.
SUPERIOR COURT, ALAMEDA COUNTY
CITY OF HAYWARD, ET AL.,
A049090
ALAMEDA COUNTY NO. H1459003

BY THE COURT:

THE PETITION FOR WRIT OF MANDATE IS DENIED.

THE JUSTICES PARTICIPATING IN THIS MATTER WERE:

ANDERSON, P.J.; POCHE, J. ; CHANNELL, J.;

THE JUSTICE WHO DID NOT PARTICIPATE IN THIS MATTER WERE:

PERLEY, J.;

DATED: April 13, 1990

/s/ ANDERSON,
_____P.J.

FILED
March 13, 1990
RENE C. DAVIDSON,
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

MICHAEL R. WOOD, an
individual,
Petitioner,

vs.

MUNICIPAL COURT OF THE STATE OF
CALIFORNIA, COUNTY OF ALAMEDA,
RESPONDENT
_____/

CITY OF HAYWARD,
Real Party in Interest.

_____/

Petitioner's petition for Writ of Mandate came on for hearing on March 8, 1990, IN Department 37 of the above-entilted court, Judge Richard A. Hodge presending. Real Party In Interest City of Hayward appeared by its counsel, Debra S. Margolis, Deputy City Attorney II. The court having read and considered the oral and written evidence presented, and good cause appearing therefore,

IT IS HEREBY ORDERED that petitioner's petition for writ of mandate is denied in its entirety.

Dated : March 8, 1990
Presented for signature and signed
March 13, 1990

/s/ RICHARD A. HODGE

Judge of the Superior Court

FILED
JANUARY 2, 1990
WAYNE LOW, CLERK OF THE
MUNICIPAL COURT

MUNICIPAL COURT OF CALIFORNIA
COUNTY OF ALAMEDA
SAN LEANDRO-HAYWARD JUDICIAL DISTRICT

CITY OF HAYWARD,
a municipal corporation,
plaintiff,

NO. 425171-2
ORDER

vs.

MICHAEL R. WOOD,
an individual,
defendant.
_____/

Defendant's motion to quash service of summons came on for hearing ON December 26, 1989, IN Department 9 of the above-entitled court, Judge Leo Dorado, presiding. Plaintiff City of Hayward appeared by its counsel, Debra S. Margolis, Deputy City Attorney II. Defendant Michael R. Wood appeared in propria persona. The court having read and considered the oral and written evidence presented, and good cause appearing therefore,

IT IS HEREBY ORDERED that defendant's motion to quash service of summons is denied in its entirety.

Dated: 12/29/89

/s/ Leo Dorado
_____
judge of the municipal court